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No. 91-347

In The

Supreme Court of the United States

October Term, 1991

DONNIE WEIL and KIM WEIL, Individually, and on Behalf of their Minor Daughter, DAY WEIL,

Petitioners,

vs.

THE BOARD OF ELEMENTARY AND SECONDARY EDUCATION and THE OUACHITA PARISH SCHOOL BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT OUACHITA PARISH SCHOOL BOARD

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I. STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This lawsuit began with a due process hearing before a hearing officer certified by the State Board of Elementary and Secondary Education. That hearing was held on January 21 and 22, 1987. At that time, the parties were Mr. and Mrs. Weil and the Ouachita Parish School Board. The Board of Elementary and Secondary Education ("B.E.S.E.") was not a party and there were no claims made with respect to B.E.S.E.'s function any time prior to suit. The hearing officer rendered an opinion in favor of the Weils as to past reimbursement and in favor of the School Board as to future placement. The School Board appealed, to an administrative review panel of three persons qualified by B.E.S.E. This review panel reversed the finding of the hearing officer, as being

predicated upon errors of law insofar as it was against the School Board. The Weils appealed the hearing officer's decision denying future private placement, which the review panel affirmed.

Thereafter, the Weils filed suit against the School Board in the U. S. District Court for the Middle District of Louisiana, seeking relief from the administrative decision. In this action, the Weils also named B.E.S.E., for the first time asserting claims that B.E.S.E.'s review panel procedure denied due process of law. (No. 87-472, Section A, U.S.D.C., M.D. La.) (R.p. 2, et seq.)

Both defendants filed Motions to Dismiss in that court. (R.pp. 24 et seq., 31 et seq.) In addition, the School Board filed a motion to transfer the case to the Western District of Louisiana, Monroe Division, where it is domiciled, as are

the Weils. (R.p. 24, et seq.)

The U. S. District Court for the Middle District of Louisiana granted B.E.S.E.'s motion to dismiss, on Eleventh Amendment grounds. It then granted the School Board's motion to change the venue, and pretermitted ruling on the School Board's other motions. (R.pp. 37-41).

An appeal by the Weils of the dismissal of B.E.S.E. was dismissed by the Fifth Circuit as premature. (R.pp. 42-55).

The U. S. District Court for the Western District of Louisiana denied the School Board's pretermitted motions to dismiss. (R.pp. 65-69). The case was tried and a written opinion was issued on May 16, 1990, in favor of the School Board. (R.pp. 178-194). Judgment was signed on June 3, 1990. (R.p. 195). No post-trial motions were filed.

The Weils filed an appeal, seeking review both of the decision to dismiss B.E.S.E. and of the judgment on the merits as to the School Board. (R.pp. 197-198). The Fifth Circuit affirmed in all respects. The Weils petitioned this Court for a Writ of Certiorari.

B. STATEMENT OF FACTS

1. In General

The brief of the Weils does not contain a distinct statement of facts. Therefore, we include the following, which is in significant part drawn from the District Court's Memorandum Ruling.

The Plaintiffs are the parents of Kimberly Day Weil, called "Day," born on October 3, 1976. Day is severely or profoundly mentally retarded and cannot speak. She uses combinations of formal and informal signs, gestures and actions to communicate, with some use of

communication boards in more recent years. She has poor fine motor and gross motor skills. Although her level of motor function is a relative strength for her, because it is significantly greater than her level of intellectual or cognitive function.

Day has a seizure disorder along with behavioral problems, at times biting, pinching, pulling hair and refusing to cooperate. Her behavior has long been considered a serious problem by her educators and therapists. Her most significant educational needs are in the areas of self-help skills and communication.[1]

This litigation is focused on Day's placement at Kiroli Elementary School from

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1. The general facts in these two paragraphs are drawn from the District Court's opinion and are not disputed by the parties. They are supported by a great deal of evidence which permeates the transcript and exhibits, which cannot be cited without becoming cumbersome.

the fall of 1985 until February of 1986. Prior to that time, Day had been in a variety of educational environments, a summary of which is useful in understanding this case.

Day was recognized to be mentally retarded and developmentally delayed when she was nine months old. When she was two, she was enrolled in the Strauss Rehabilitation Center, in Monroe. She lived at home. She also received private speech therapy. (TR. pp. 61-62).

About ten months later, in 1979, she was enrolled in a pre-school special education program at Sherrouse Elementary School, a public school in the Monroe City School System. She continued to receive some services at Strauss, as well as private speech therapy. The Weils were dissatisfied with Sherrouse. (TR. p. 62). They provoked, but then withdrew, due

process proceedings. (Joint Ex. 16 pp. 176-177). (TR. pp. 3-4)

In August of 1980, the Weils moved into Ouachita Parish outside of Monroe, and enrolled Day Crosley Elementary School. She remained there until February, 1981. They found the Crosley program satisfactory. (TR. pp. 63, 189) but, after consultation with Day's teachers, they transferred her to the Columbia State School (a public residential facility about twenty miles from Monroe), where she remained until February, 1983. (TR. p. 63). The Weils agree that the program at Columbia worked well. (TR. pp. 63, 188).

In February of 1983, the Weils enrolled Day in the Institute of Logopedics (the "I.O.L.") in Wichita, Kansas. At this time, Day was almost seven years old. The I.O.L. is a private

residential school specializing in dealing with severely handicapped children, with a particular emphasis on communication skills. (TR. pp. 134-135). In 1989, it had fewer than fifty students and a total staff of over three hundred employees. (TR. pp. 95; 127-128).

Day remained at I.O.L. until August of 1983, when she was withdrawn to be hospitalized because of difficulties with her seizure disorder. In October of 1983, after stabilization of the problem, she returned home to live and enrolled at Riser Elementary School. (Joint Ex. 16 p. 67) (TR. pp. 3-4). She remained there until January, 1984. (TR. pp. 63-64).

In January of 1984, Day was enrolled at the G. B. Cooley School, which is located in Ouachita Parish. She still lived at home. (TR. p. 64).

For clarity in the factual narrative,

it is important to correct a misstatement in Plaintiffs' brief to the Fifth Circuit. That brief refers to G. B. Cooley as a private school. It is not, as the record makes clear. It is a public facility which, until August of 1985, included, pursuant to intergovernmental agreements, day student special education programs for more severely handicapped students of the Parish School Board and Monroe City School Board. These programs were conducted by School System employees in large part. See: Testimony of Mr. Hoyt Lee, Assistant Superintendent of Schools, TR. pp. 208-209; testimony of Mrs. Evelyn Evans, TR. pp. 210, 219. In the Pretrial Order, it was an admitted fact that the program in which Day was enrolled at G. B. Cooley was a joint operation with the School Board. (R.p. 130). Mr. Weil testified that G. B. Cooley placement was through the School

Board. (TR. p. 65). (Joint Ex. 16, p. 89) (TR. pp. 3-4). The trial court found that the G. B. Cooley placement was a Parish School Board placement. (R. pp. 180-181, 184-185).

Day stayed full-time at G. B. Cooley - until August of 1984. At that point, she attended G. B. Cooley part-time and had a home study tutor as well. In December of 1984, she was withdrawn by her parents from G. B. Cooley, from then until April of 1985, was educated entirely at home. Her parents found this satisfactory, except that it did not socialize Day with other children. (TR. pp. 64-65).

In the spring of 1985, Day was again enrolled at G. B. Cooley. (TR. p. 65). Her teacher was Evelyn Evans, who is employed by the School Board and is acknowledged by the Weils to have been a

good teacher. (TR. pp. 72, 192).

In August of 1985, for reasons beyond the control of the School Board, the Parish School program at G. B. Cooley was terminated, on very short notice. (Pre-Trial Order Admitted Facts, R.p. 130). Day was therefore placed at Kiroli Elementary School, a regular elementary school, grades K-6, serving both handicapped and non-exceptional children.

On May 2, 1985, at the outset of the placement of Day at G. B. Cooley, an I.E.P. was done for Day and signed by both her parents and Parish School officials. (Joint Ex. 1; TR. p. 65) (TR. pp. 3-4). When Day began at Kiroli in August of 1985, the School Board continued to execute the May, 1985 I.E.P. An I.E.P. conference was scheduled for October 3, 1985, but was postponed at the request of the Weils. (R. p. 181). After further

conferences, a new I.E.P. was signed on November 7, 1985. It called for an evaluation of Day's need for occupational therapy and physical therapy. (Joint Ex. 2 and 3)(TR. pp. 3-4).

Those evaluations were performed, concluding that Day did not require these therapies to derive educational benefit from her school program. This conclusion derived from the fact that Day's limiting problems were her cognitive level, which was below her physical level of function, and her behavioral problems. (Joint Ex. 4; (TR. pp. 3-11) Def. Ex. 3; (TR. p. 8) (TR. pp. 240-241; 244-245; 249-250; 262-263; 267).

The Weils, by December 2 or 3, 1985, made a final determination to withdraw Day from Kiroli and send her again to the I.O.L. (TR. p. 74). They did not seek to have her I.E.P. revised, nor invoke their

due process rights prior to withdrawing her. (TR. pp. 75-76). They unilaterally withdrew her from Kiroli, enrolling her in I.O.L. in February of 1986, after failing to respond to the requests of Day's teacher that they meet to review Day's status and I.E.P. (Joint Ex. 8 and 16 at p. 234) (TR pp. 3-4).

2. **PHYSICAL FACILITIES AT KIROLI**

Mr. and Mrs. Weil have in part based their claim on the alleged inadequacy of the physical facilities at Kiroli. We therefore briefly address the facts relating to that assertion.

At Kiroli, Day's class (seven students, a teacher and two aides) (Joint Ex. 16, p. 525). (TR. pp. 3-4) was located in the school's cafeteria-auditorium for approximately one week. Then, for several weeks, it met in a temporary class building also used, at

other times, for band. For the remainder of the semester, the class met in one of Kiroli's temporary classroom buildings, reserved exclusively for its use. (Joint Ex. 16, pp. 526-528; pp. 925-926) (TR. pp. 3-4).

Day received individual speech therapy several times weekly at Kiroli. This required her to meet alone in a room with a speech therapist. This room, which Plaintiffs' brief refers to as a "closet," was five or six feet wide and ten feet long, with a window, a mirror and a table with two chairs for use by the therapist and the student. (TR. p. 76-77). Day was served by a certified special education teacher, two aides, certified speech therapists, and a certified adaptive physical education teacher. She also had consultation by a certified occupational therapist. There was no expert testimony

to indicate that the facilities or the personnel were unqualified or unsuitable.

Beginning in 1986, Kiroli and all other Parish Schools west of the Ouachita River were the subject of construction and renovation pursuant to a 29.5 million dollar bond issue. (TR. pp. 207-208). The Weils admit freely that they are unfamiliar with the facilities as they are since that time, and unfamiliar with the School System's personnel and programs at any time since January, 1986. (TR. pp. 98, 203). The School System has at all times had all of the qualified personnel to meet Day's needs. (TR. p. 205-207). We mention these facts only because the Weils pursued claims for the cost of future placement at I.O.L., even while admitting their ignorance of the locally available programs and admitting their unwillingness to even meet to

consider them. (TR. pp. 77; 98-100; 202).

3. DAY'S PROGRESS

Day is severely or profoundly mentally retarded and has other associated handicaps as well. She has never been able to speak verbal language She can make sounds and can understand spoken language to a degree.

When Day first went to I.O.L. in 1983, she could do no signing at all. She was seven years old., with a mental age of one year. (TR. p. 65-66). During the two preceding years, while at Columbia State School, Day had improved her self-help skills significantly. (TR. p. 66).[2]

In 1983, while enrolled at I.O.L., her fine motor skills were evaluated at the level of a 13-16 month old child. When she left I.O.L. in July, 1983, she

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2. "Self help skills" include such things as brushing teeth, eating, washing hands, undressing or dressing, toileting, and so on. (TR. p. 91).

had regressed to a 14 month level. (TR. pp. 68-69; Pl. Ex. 4, pp. 3-4). Her gross motor skills did not change measurably. (Def. Ex. 54 p. 4 "Motor" (TR. p. 8) and Pl. Ex. 4, pp. 5-6). (TR. p. 6).

By May of 1985, Day had a signing vocabulary of about five signs. (Pl. Ex. 11, p. 6). (TR. p. 6). Her ability to express herself was at the level of approximately a 14 month old, and her ability to comprehend speech or communications was approximately that of a two year old. (Pl. Ex. 11, p. 5). (TR. p. 6).

By the time Day left Kiroli and enrolled at I.O.L. in February, 1986, her expressive speech abilities had improved to the 17-20 month level. Her receptive speech ability had remained essentially unchanged since the previous May. I.O.L. reported her signing vocabulary to be

improved to about 20 words upon enrollment. (Joint Ex. 13, p. 28; (TR. p. 5). Pl. Ex. 25, p. 3). (TR. p. 6).

In early 1987, after a full year at I.O.L., Day's signing vocabulary remained at about 20 words. (Pl. Ex. 37, p. 4) (TR. p. 6). When she left I.O.L. in June of 1988, her vocabulary was still only 20 words. (Pl. Ex. 81; 93A p. 9; 93B p. 3). (TR. p. 6).

By February of 1989, at Columbia State School, she could sign 23 words. By June of 1989, Columbia reported her signing vocabulary to be 31 words. (Pl. Ex. 101, p. 5 and 94, p. 9). (TR. p. 6).

Her speech abilities, since 1987, have fluctuated around the level of a two year old for expressive speech and between two and three years for receptive speech. (See Joint Ex. 13, pp. 28-29). (TR. p. 5).

Day has had periods of progress, plateau and regression, regardless of her environment or educational program. This history is typical of severely retarded children and is to be expected when they are subjected to much change. (TR. pp. 139, 153-155; see Mr. Weil's testimony, TR. pp. 104-105; Joint Ex. 13, p. 29; Joint Ex. 12, pp. 22-24). (TR. p. 5).

Day did not achieve more than a fraction of the I.E.P. goals and objectives set for her, regardless of the time or educational placement. This is also not unusual for the severely handicapped, particularly when the time in a particular program is short. (TR. pp. 150-155).

We summarize these facts to give this Court context, and to illustrate that regardless of time, place or program, Day Weil's progress has been very slight and

not consistent; that her level of function is quite limited; and that her motor skills are rated as significantly superior to her intellectual skills.

4. DECISIONS OF THE COURTS BELOW

The findings of the District Court, adopted by the Fifth Circuit, are thorough, articulate and reasoned. They may be summarized as follows.

The District Court found that Day's I.E.P. of May 2, 1985, at G. B. Cooley, was formulated and agreed to by the Weils and Parish School officials. An I.E.P. conference was held October 3, 1985, but postponed at the request of the Weils. On November 7, 1985, a new I.E.P. was signed by School Board officials and the Weils. That I.E.P. called for evaluation for (not provision of) occupational and physical therapy.

The Court below concluded that no new

I.E.P. was required by law prior to providing services to Day at Kiroli. The May, 1985, I.E.P. remained valid. The School Board did not procedurally violate E.A.H.C.A., nor did it deny Day a free appropriate public education, to utilize the May, 1985 I.E.P. until November of 1985.

The District Court reviewed the procedural devices of E.A.H.C.A. and found that the Weils were accorded all of the procedural safeguards of the statute.

The District Court found that Day made progress at Kiroli, and was provided with "some educational benefit" there in the fall of 1985. It also found that the facilities at Kiroli were adequate. It found that, while occupational or physical therapy may have been helpful to Day, neither was necessary. The Court concluded that the absence of these

therapies did not deny Day a free appropriate public education, because she could and did gain educational benefit without them.

The Court found that Day's progress varied at times, as is normal, including regressions, and that changes in her environment had often inhibited her progress. It noted that her time at Kiroli was brief and she was given little time to adapt to Kiroli before the Weils withdrew her.

It said that while her progress might have been maximized by a facility like I.O.L., that this was not the requirement of E.A.H.C.A. Day, the Court concluded, was not deprived of a free appropriate public education at Kiroli. Further, the Court noted the absence of any proof that the School Board cannot now appropriately provide for Day.

The Fifth Circuit affirmed, adopting the District Court's opinion and additionally ruling, on an issue not raised prior to appeal. That the Weils were not deprived of proper notice, under the circumstances, of Day's change of location to Kiroli in August of 1985.

II. SUMMARY OF ARGUMENT

The burden of proof is upon the Weils to show that Day was denied a free appropriate public education at Kiroli in the fall of 1985; that she could not have received a free appropriate public education at any available public facility in Louisiana, warranting her removal to a private, out-of-state facility; and that the facility to which she was removed and the program in which she was placed were appropriate. In reviewing the District Court's finding that the Weils failed to meet that burden,

the District Court's factual conclusions must stand unless "clearly erroneous."

The District Court concluded that Day Weil's May 2, 1985 I.E.P. at the G. B. Cooley School was an I.E.P. confected between the Weils and the School Board and was available for implementation a few months later at Kiroli. It also concluded that any "delay" in revising that I.E.P., until the fall of 1985, was due to circumstances not within the control of the parties. These findings are supported by substantial evidence and are not "clearly erroneous."

The District Court and the Fifth Circuit concluded that the governing regulations do not require a new I.E.P. to be made prior to the start of each school year. Rather, they require that an I.E.P. be <u>in effect</u> at the beginning of each school year and that I.E.P.'s be reviewed

and, if necessary, revised at least once annually. Thus, the School Board properly utilized the new May 1985, I.E.P. a few months later, and properly revised it in the fall of 1985, less than six months later. The Weils' argument that the law requires a new I.E.P. every September, regardless of how recently the existing I.E.P. may have been confected, is legally unsound. The regulatory law clearly is to the contrary and the Courts below correctly so concluded.

E.A.H.C.A., as interpreted by the Courts, requires that an I.E.P. provide to the child a reasonable opportunity to derive some educational benefit, in accordance with the unique needs of that child. Support services, such as therapies, are required only to the extent they are necessary to enable the child to derive educational benefit.

The District Court concluded that the facilities and resources at Kiroli were adequate to allow Day a reasonable opportunity to derive educational benefit. It also concluded that she did, indeed, derive educational benefit from the Kiroli program and, to the extent it was not greater progress, a likely cause was that Day was not allowed to remain at Kiroli long enough to adapt to that environment. These conclusions are well supported by evidence and are not "clearly erroneous."

The District Court also concluded, with a great deal of expert and factual evidence to support it, that Day did not require occupational therapy or physical therapy to enable her to derive benefit from her educational program. The Court found that Day did actually benefit at Kiroli without them, as she had done in earlier placements without such therapies.

Thus, although such therapies might have been useful to Day, they were not mandated by E.A.H.C.A. The limiting factors in Day's educational progress were cognitive and behavioral. Although her muscular function was developmentally delayed, it was not the obstacle to further educational progress, in the opinion of the experts who testified and of the District Court. This conclusion is well grounded in the evidence.

E.A.H.C.A. does not require a program designed to maximize each child's potential. While an elite private program like I.O.L. may more nearly do that, that is not the mandate of E.A.H.C.A. Day could and did benefit in the Ouachita Parish public schools. Considering that the public schools provided a less restrictive environment, where Day lived at home and attended a school also

attended by non-exceptional children, the District Court's conclusion that E.A.H.C.A. was not offended is proper.

The procedural requirements of E.A.H.C.A. were met, as the District Court found. I.E.P.'s were confected and signed by the Weils. Although they were familiar with their right and the process to seek revision of an I.E.P., they elected not to pursue it. They unilaterally withdrew Day and provoked a full due process hearing, followed by an administrative appeal, all as provided by Federal law and State regulation. That process was followed by their institution of this litigation. They have surely had due process of law.

Plaintiffs interjected for the first time in argument before the Fifth Circuit an argument that the Weils were not properly given formal notice of the change from the G.B. Cooley site to the Kiroli

site. The School Board contends that this issue was not properly before the Court, as it had not been raised in the administrative process or in the District Court. Nevertheless, the Fifth Circuit did consider it -- and properly rejected the Weils position.

We do note that it was stipulated that the change of location occurred and was on short notice for reasons not attributable to the School Board. We also note that the Weils made no objection and agreed to and signed an I.E.P. at Kiroli, surely mooting this highly technical and afterthought objection. Their claim and their testimony is that they withdrew Day because of dissatisfaction with the terms and implementation of the November I.E.P. -- not because they were not formally notified of the site change. There was no evidence of objection to the site change,

no evidence that the site adversely affected Day -- indeed, it was a less restrictive environment. Further the Fifth Circuit correctly concluded that, under the facts presented here, there was no "change in educational placement" requiring formal notice; and that the alleged lack of notice was not actionable because it would have been impossible for Day to have stayed in her "then current educational placement."

We submit that the decisions of the Courts below are sound and supported by the evidence in the record. The opinions are clear, reasoned and correct.

III. ARGUMENT

A. OVERVIEW OF THE GOVERNING LAW

The Education for All Handicapped Children Act (E.A.H.C.A.), 20 U.S.C. § 1401, et seq., in general provides that in order for the States to qualify for

certain Federal funds, they must undertake the obligation to provide to all children of elementary and secondary school age, who are handicapped within the meaning of the Act, a free appropriate public education. This education must be provided pursuant to regulations adopted by the State and approved by the Secretary of Education, and pursuant to an Individualized Education Program (I.E.P.) devised through consultation among the child's parents and appropriate school personnel. It must provide for such "related services," as defined by the Act, as are necessary for the child to have the opportunity to derive some benefit from the education program. 20 U.S.C. § 1407-1415; Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed 2d 690 (1982).

The Louisiana regulations which are

approved under this Act are known as Bulletin 1706 of the Board of Elementary and Secondary Education. (Def. Ex. 1). (TR. p. 8)

Judicial review is de novo, but the administrative record is admitted and is entitled to some deference. 20 U.S.C. § 1415(e)(2); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983); Rowley, supra.

The burden of proof was upon the Weils to show that the education offered at Kiroli was not appropriate; that there is no other public facility which does offer an appropriate education for Day; and that the private placement for which they seek public funds is appropriate. Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981). It is rebuttably presumed that the placement and program envisioned by the child's I.E.P. provides an appropriate education. Honig v. Doe, 484 U.S. 305,

108 S.Ct. 592, 98 L.Ed. 2d 686 (1988); Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984).

Review by the District Court is de novo. It is not free to substitute its ideas of education for those of the school system. Once the Act's requirements are met, the means and methods of education are left to the State. Although judicial review is not limited to insuring compliance with procedural requirements, adequate compliance with these requirements will in most cases assure that the Congressional purposes are satisfied. If the State has complied reasonably with the procedural requirements, the Court must determine whether the I.E.P. is reasonably calculated to enable the child to receive some educational benefit. If so, then the

State has complied with the obligations imposed upon it under the Act, and the Court can require no more of it. Board of Education v. Rowley, supra.

Claims of non-compliance with E.A.H.C.A., either procedurally or substantively, are not actionable under any other law. E.A.H.C.A. is the exclusive remedy for matters within its scope. Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1964); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983). Only issues as to which administrative remedies have been invoked and exhausted may be the subject of judicial review under E.A.H.C.A. Riley v. Aubach, 668 F.2d 635 (2d Cir. 1981); Sessions v. Livingston Parish School Board, 501 F. Supp. 251 (M.D. La. 1980);

Daniel B. v. Wisconsin, 581 F. Supp. 585 (E.D. Wisc. 1984).

Precisely what constitutes a "free appropriate public education" pursuant to an "individual education program" is of necessity variable with the circumstances of the parties. However, parameters within which this standard may be judged have been established in the jurisprudence.

The obligation to provide a free appropriate public education does not require that the school system provide an ideal program, or a program which maximizes a child's potential. The law, rather, requires that a program meet the standards of the State's educational agency and be provided in conformity with the I.E.P. It is well established that this Act is satisfied when a school provides personalized instruction with

sufficient support services to permit the child to gain some benefit educationally from that instruction. The Act does not guarantee a certain level of education, or progress, but is merely designed to open the door to educational opportunity. Board of Education v. Rowley, supra; Cain v. Yukon Pubic Schools, 775 F.2d 15 (10th Cir. 1985); Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981).

An appropriate education requires that those services be provided which are required in order for the child to be enabled to derive some benefit from the educational program, in accordance with the unique needs of that child. Conversely, the term does not mean that a school system is required to provide any and all services which might be beneficial. Rettig v. Kent City School District, 539 F. Supp. 768 (N.D. Ohio

1981). E.A.H.C.A. does not require the State to furnish all therapy or other services which a child may need. Rather, it is required only to provide those services which are required to obtain benefit from special education. 20 U.S.C. § 1401 (17); 34 C.F.R. § 300.13 (1982); Tatro v. Texas, 625 F.2d 557, at 563 (5th Cir. 1980); Marvin H. v. Austin Independent School District, 714 F.2d 1348 (5th Cir. 1983), at 1354 n. 8.

Cost of the education and related services may properly be considered by the Court. A.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). It is not relevant that a different placement or different program may be superior to that offered by the public schools. Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984); Hessler v.

State, 700 F.2d 134 (4th Cir. 1983).

The Act also requires that the child's education be conducted, to the extent practicable, in the "least restrictive environment." This precept basically means that, where not inconsistent with providing educational benefit, the child's interaction with non-handicapped students and the child's residence or association with home and family is to be maximized. 20 U.S.C. § 1412(5)(B); Daniel R.R. v. State, 874 F.2d 1036 (5th Cir. 1989), at 1050.

B. STANDARD OF REVIEW

The District Court's factual determinations are subject to revision only if clearly erroneous. F.R.C.P. Rule 52(a). Thus, as to factual determinations, the question is not whether this Court would agree or disagree, but whether "on the entire

evidence [it] is left with the definite and firm conviction that a mistake has been committed." Zenith Corp. v. Hazeltine, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed 2d 129 (1969).

In this case, it cannot be fairly said that the District Court's factual findings were clearly erroneous. Each is well supported by the record. To the extent that the Weils dispute them, on appeal, they must show that the District Court was clearly erroneous. This they fail to do.

In each respect, the record reveals ample evidentiary support for the District Court's findings, as is reflected above in the statement of facts and below in argument.

C. **FREE APPROPRIATE PUBLIC EDUCATION**

The Weils argue that the District Court erred in concluding that they had

failed to prove that Day had not gotten a free appropriate public education at Kiroli. They hinge this argument on three premises:

1. That the District Court erred as a matter of law in concluding that the School Board complied with E.A.H.C.A. when it began Day's enrollment at Kiroli under the May 2, 1985 I.E.P. done in the Board's G. B. Cooley program, rather than completing a new I.E.P. prior to enrolling Day at Kiroli. The Weils argue that this I.E.P. procedure alone denied Day a free appropriate public education and warranted her unilateral withdrawal to a private placement, at public expense.

2. That the District Court erred in concluding that, although not ideal, the physical facilities and materials at Kiroli were adequate to provide Day with a free appropriate public education.

3. That the District Court erred in concluding that, Day received educational benefit from her program at Kiroli, without an educational need for occupational therapy or physical therapy.

We submit that, in each respect, these arguments are without merit and demonstrate no basis for reversing the decision of the District Court.

1. The School Board Properly Relied on the May 2, 1985 I.E.P. at the Outset of Day's Enrollment at Kiroli

The District Court found that the May 2, 1985, I.E.P. was confected by the Weils and the School Board, although the placement was in the School Board's program at G. B. Cooley School, which the School Board did not own. G. B. Cooley was a public facility. That I.E.P. was agreed to by the Weils and its propriety for Day was never in dispute.

There is no requirement in the law or in the regulations that a new I.E.P. be confected at the start of each school year. Quite the contrary, a new I.E.P. is required only once annually. Even the Weils' brief correctly states that an I.E.P. shall simply be in effect at the start of the year.

20 U.S.C. § 1414(a)(5) states, in pertinent part, that:

> A local educational agency...shall provide assurances that [it]...will establish or revise...an individual education program...at the beginning of each school year and will then review...its provisions - not less than annually.

34 C.F.R. § 300.342(a) provides that an I.E.P. shall be in effect at the beginning of the school year -- not that a new I.E.P. be done if there is already one still in effect.

34 C.F.R. § 300.343 states, in part,

that:

> ...the statute requires agencies to hold a meeting at least once a year in order to review, and if appropriate revise, each child's I.E.P. The timing of those meetings could be on the anniversary date of the last I.E.P. meeting on the child, but this is leftto the discretion of the agency.

At 34 C.F.R., Part 300, Appendix C, there is an interpretation given of these requirements in response to the specific question presented here. It states:

> II. I.E.P. Requirements...
>
> 9. Must I.E.P.s be reviewed or revised at the beginning of each school year...
>
> No. The basic requirement...is that I.E.P's must be <u>in effect</u> at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise.... However, the meetings may be held at any timeduring the year....

34 C.F.R., Part 300, Appendix C, demonstrates that even a change of setting does not require a new I.E.P., if the

current I.E.P. can be implemented.

The School Board and the Weils created a new I.E.P. for Day on May 2, 1985. The location at which that I.E.P. would be effected changed at the end of August, 1985, but that I.E.P. remained in effect and available for implementation. Within a reasonable time under the circumstances, as the District Court found, the I.E.P. was revised. We note that the change of setting was to a less restrictive environment, since Day was previously at a site which educated only handicapped children, while Kiroli gave her exposure to the non-exceptional children at the school.

The I.E.P. of May 2 was deemed appropriate by the Weils and that is not contested here. The District Court did not err in concluding that, under the circumstances, it was permissible, lawful

and reasonable to begin Day's enrollment at Kiroli by continuing to implement that same I.E.P., which was only four months old at the time.

The argument by the Weils that the failure to do a new I.E.P. at the end of August warranted Day's unilateral withdrawal in February is specious. Months before the withdrawal, a new I.E.P. had been formulated and signed by Mr. and Mrs. Weil. By the time of withdrawal, the previous reliance on the May 2, 1985 I.E.P. for sixty days or so had become moot. It is not logical to argue that the Weils were justified in withdrawing Day for a reason that did not exist at the time and had not existed for months. Such an assertion would certainly not support any claim for extended future private placement.

2. The Trial Court Did Not Err in Concluding that the Physical

Facilities at Kiroli Did Not Deny Day a Free Appropriate Public Education

The District Court concluded that the physical facilities at Kiroli, were adequate to provide an appropriate education to Day under the circumstances. There was no evidence that the use of a temporary classroom building was detrimental to Day or prevented her from receiving benefit from her education. There was no evidence, nor even a claim, that the classroom was defective in any way.

There is no evidence that having Day's class meet for a couple of weeks in other rooms, while a permanent class was readied, prevented Day from gaining benefit from her educational program.

Plaintiffs have presented no evidence at all, from any expert person, to suggest that the physical facilities at Kiroli Elementary School were inadequate to

provide Day with a reasonable opportunity to derive benefit from her educational program. Plaintiffs' evidence consisted of the Weils' own dissatisfaction with the physical situation for a few weeks.

The class met in the cafeteria-auditorium for three or four days (Joint Ex. 16, p. 589) (TR. pp. 3-4). It then met in a building also utilized as the band room after school, for less than two weeks, while a new T-building was readied for the exclusive use of this class. (Joint Ex. 16, p. 591) (TR. pp. 3-4). The class had only a few children, with a teacher and two aides. Part of each day, Day got adaptive P.E. Part of each day, she was with her speech therapist. Each of these related services took place apart from the classroom.

Speech therapy was conducted in a small room -- but there were only two

people there, Day and her therapist, sitting at a table and chairs for less than one hour. There is no evidence that the size of the room adversely impacted the benefit of Day's speech therapy.

It is impossible to conclude that the District Court's factual conclusions with respect to the physical facilities are "clearly erroneous." On the contrary, the Weils' claim, to the extent based upon this factor, is unsupported.

3. Day Weil Did Not Require Direct Physical Therapy or Occupational Therapy to Derive Benefit from Her Education Program

The Weils argue that the decision of the School Board that Day did not require direct physical and occupational therapy denied her a free appropriate public education, because she could have gotten benefit from those therapies. In this respect, the Weils' position fails to make

clear a critical distinction of overriding legal significance. It also relies upon a misstatement of the import of the testimony of Patricia Navarro Shoudy at the trial.

The Weils argue, in sum, that Day had limitations of her motor skills; that physical and occupational therapy might help in those areas; and that therefore denial of those therapies constitutes denial of an appropriate education. This assertion is incorrect.

As we have noted above, the law requires that related services, such as occupational or physical therapy, be provided only if the child is, in their absence, not capable of deriving benefit from her educational program. The Weils have stated the matter conversely from the law, arguing that Day could benefit from the therapies, not that she was unable to

benefit without them.

In so arguing, the Weils' brief misstates the testimony of Patricia Shoudy, the occupational therapist who evaluated Day and consulted with Day's teacher at Kiroli, by presenting a small portion of it taken grossly out of context.

In the cited passage, Ms. Shoudy testifies that Day Weil could have benefited from occupational therapy. Ms. Shoudy's testimony, at TR. pp. 227-276, taken as a whole, clearly states that, while Day may have been able to benefit in a therapeutic sense from occupational therapy, she did not need occupational therapy in order to gain benefit from her educational program. She further testified that, under regulatory provisions designed to determine who, educationally, needed such therapy, Day

did not need it in 1985. This conclusion is explicit from her testimony, and the extracted references cited in the Weils' brief are patently misleading.

We observe for the Court's benefit the following parts of Ms. Shoudy's evidence:

> In the educational setting, we are set there for children who need our services to benefit from the educational setting, and it's strictly educational. It's not a medicaloriented frame of reference. (TR. p. 229).

Immediately following the testimony quoted by the Weils' brief, Ms. Shoudy continued, saying:

> My concept of benefit does not mean that they have to have that to be able to be educated. I can benefit from a lot of things, but I don't have to have them every day to be able to do what I need to do.
>
> * * *
>
> No, I think that you have to, there is a lot of children that at one point in time they could benefit from O.T., okay? There

is another group of children out there who need O.T. to be able to benefit from an education setting. There is a difference.

THE COURT: So you are saying that some need O.T.?

THE WITNESS: Some children can't sit in their chair, okay?

THE COURT: They must have it.

THE WITNESS: They have to have O.T.

THE COURT: But some of us who can, for instance, sit in the chair, might well benefit from O.T.?

THE WITNESS: Yeah, they can benefit. I mean.

THE COURT: Why wouldn't you give it to them if they could benefit?

THE WITNESS: Because if we did that we would be serving every single child in the United States with every single qualified person you could get.

(TR. pp. 249-250).

Ms. Shoudy later explained:

Day did not have muscular incoordination so much that she could not pick up and put a sandwich in her mouth, okay. It

was my professional opinion, it was the teacher's professional opinion that at that time it was not a fine motor problem, it was a cognition, an attention problem, and a behavior problem.

(TR. pp. 262-263).

Q. You testified on cross-examination that occupational therapy could have helped Day. My question to you is did she need occupational therapy in order to gain educational benefit or to learn?

A. I don't believe so at that time. ***.

(TR. p. 275).

Ms. Shoudy explained that the basis in regulatory provisions and in the educational context for her conclusions was that the developmental level of Day's motor skills was superior to the developmental level of her cognitive skills, by more than a full year's developmental age. Thus, Day's primary limiting problem was her cognitive skills, not her motor skills. (See TR. p. 230; pp. 242-245; pp. 252-255). This

limitation was compounded by her behavioral problems and lack of attention span, which are not addressed by occupational therapy. (TR. p. 268).

The import of this evidence is that, in order for a child to require a therapy of this sort to enable them to benefit educationally, their physical limitations must be a barrier to learning things which they are cognitively and behaviorally capable of learning. The physical handicap must rise to the level of an educational barrier. The evidence in this case, for Day Weil in 1985, is that it did not.

Indeed, Day's motor skills have generally been recognized to be a relative strength for her during that time of her life. I.O.L.'s records in February of 1986 record Day's size, strength and muscle tone to be normal. They reported

her gait, station and posture to be normal and that she had a relative strength in her functional use of fine motor skills. (TR. pp. 80-81). (Pl. Ex. 24, pp. 9-10 in the Neurological Exam Report, p. 19 in the Education Evaluation Report). (TR. p. 6).

Mr. Weil admitted that Day was capable of deriving benefit from the educational setting without those therapies. (TR. pp. 96-97).

Plaintiffs offered no evidence to contradict this. No expert testified that Day could not derive benefit from her educational setting in 1985 without direct physical and occupational therapy. Plaintiffs' evidence was simply that Day, they believed, would gain something further, or faster, if she did have the therapies -- but that is not what the law requires. (Testimony of Mr. Weil, TR. pp.

96-97).

The School Board did provide indirect therapy to Day. Ms. Shoudy worked with Day to devise splints to help her work with crayons and she consulted with her teacher to give suggestions and guidance for work with Day's motor skills. (TR. pp. 235-238; 260). Day got adaptive physical education, which is similar to the work of the therapists. (TR. p. 239-240). Even I.O.L. provided therapy often in these "consultative" (as opposed to direct) modes, and recognized that there was nothing unusual about that. (TR. p. 143).

We also note that Day did progress, in her very brief time at Kiroli, in her physical skills. Even Mr. Weil conceded that this might be so. Her behavior improved, she made some progress in drinking from a cup, on rolling and

playing with balls, on responsiveness to directions and commands. (TR. p. 79).

Despite the testimony of the Weils to the contrary, it is evident that Day's signing also improved. As noted above, the Weils agree that Day could form only a few signs when she began at Kiroli. (Supra, pp. __-__). Although the Weils do not agree, the records of I.O.L., upon Day's transfer out of Kiroli in February of 1986, show that I.O.L. evaluated Day's signing capacities to have improved to twenty words. (Joint Ex. 13, p. 28).

Certainly the record contains more than sufficient evidence to support the District Court's conclusions that Day could and did progress in her educational program at Kiroli without direct occupational or physical therapy. Thus, the District Court's findings are not clearly erroneous and constitute no basis

for review.

4. Additional Considerations

We additionally observe that the placement at Kiroli was a far less restrictive environment than that at I.O.L. I.O.L. is a residential school hundreds of miles from Day's home, serving only severely handicapped students, where Day lived year round except for brief home visits. Kiroli is a day school serving both handicapped and non-exceptional students, so that Day could live at home with her family, associate with non-exceptional children, and in general live in a less restrictive environment. Even the Weils and their witnesses agreed that Day could live at home and be educated in a day school setting. (TR. pp. 96; 137-138; 196; 202-203). This factor, we submit, lends additional support to the District

Court's conclusion that her education at Kiroli was appropriate.

Also, the Weils have failed to prove that the proposed placement at I.O.L. was appropriate. They have not shown that I.O.L. is a facility approved by the State of Louisiana, which is required by law. (Def. Ex. 1, Bulletin 1706, 104, 452(B)(2)). (TR. p. 8) They have acknowledged that Day does not require a residential placement. They have acknowledged that I.O.L. is an elite school, whose programs have as their intent to achieve the best for each child. (TR. pp. 95; 187; 134-135). While surely laudable and desirable, this is not what the statute requires at public expense.

5. Notice of Transfer to Kiroli

As the Fifth Circuit noted, this issue was not raised prior to appeal. Therefore it should not have been

considered by the Fifth Circuit and should not be considered by this Court.

If it is considered, we submit that the issue should be deemed to be moot. After the transfer to Kiroli, the Weils agreed to a new I.E.P. They freely admitted at trial that they were fully conversant with all of their procedural rights under E.A.H.C.A. They withdrew Day and instituted this proceeding, not because Day was transferred to Kiroli or because they did not receive notice of it, but because they were dissatisfied with the November 7, 1985 I.E.P. and its implementation. This issue is a mere afterthought, never mentioned before the District Court's decision adverse to the Weils. It is not properly an issue in this case.

Even if it is, the issue was correctly resolved by the Fifth Circuit.

There was no "change in educational placement" here. Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Ed. 629 F.2d 751, 754 (2d Cir. 1980), cert. den. 449 U.S. 1078, 101 S. Ct. 858, 66 L.Ed.2d 801 (1981); Christopher P. v. Marcus, 915 F.2d 794, 796 n.1 (2d Cir. 1990), cert. den. __ U.S. __, 111 S.Ct. 1081, 112 L.Ed.2d 1186 (1991); Tilton v. Jefferson County Bd. of Ed., 705 F.2d 800, 804 (6th Cir. 1983), cert. den. 465 U.S. 1006, 104 S.Ct. 998, 79 L.Ed.2d 231 (1984).

Even if this had been a "change in educational placement," there was no violation. Because the facility at G.B. Cooley was no longer available, the location of Day's education had to change, regardless of notice. I.E.P. conferences were held and a new I.E.P. agreed to at

Kiroli. "Notice" would have effected no other result.

The Fifth Circuit, if it was correct in treating this issue at all, correctly resolved it.

IV. CONCLUSION

The District Court's and Fifth Circuit's decisions should be affirmed. They are founded upon correctly stated and applied principles of law and upon factual conclusions which are amply supported by the evidence and cannot be said to be clearly erroneous.

This case involves circumstances for the Weil family which are most difficult and which cannot fail to invite natural human sympathies. Day is severely handicapped. Her parents naturally want to do all that can be done for her, in the best way that it can be done. It is our humane response to have similar

inclinations. That is good, but that is not what is the issue in this litigation. To wish to provide the maximum effort to help Day is human, but it is not what the law requires of the School Board at public expense. This case is concerned with what is mandated by law, and whether the District Court clearly erred in concluding that the Weils failed to prove that the mandates of law were not satisfied.

We have not addressed the merits of the claims against B.E.S.E. Those claims are mooted by the decision that Day received a free appropriate public education. Even if not mooted, they are distinct and their outcome should not impair the validity of the decision with respect to the School Board.

The statements in the Petition for Certiorari that any child but Day Weil

would have won in this case are hyperbole. There is nothing unusual about a Court limiting its opinion to the facts before it, and that does not imply that the party against whom that decision was resolved was discriminated against or singled out. It merely means that the facts of the case are unusual and that therefore one should be cautious in deriving principles of broad application from the decision.

The decisions below are thoroughly supported by the evidence and well grounded in the law. There is no occasion here for review by this Court. Certiorari should be denied.

Respectfully Submitted,

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